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IN THE

Supreme Court of the United States

DECEMBER TERM, 1977

No. 77-831

LO-VACA GATHERING COMPANY,

Petitioner,

v.

THE RAILROAD COMMISSION OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Temporary Emergency Court of Appeals of the United States entered on October 19, 1977.

CITATIONS TO OPINIONS BELOW

The opinion of the Temporary Court of Appeals of the United States dismissing Petitioner's complaint for want of jurisdiction is attached hereto as Appendix A and is not reported in the official reports.

JURISDICTION

The decision of the Temporary Emergency Court of Appeals was entered on October 19, 1977. This Petition for Writ of Certiorari was to have been filed within thirty

days of that date, but upon motion of Petitioner, Chief Justice Burger extended the time for filing this Petition until December 9, 1977. This Petition for Writ of Certiorari was timely filed.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1) and under Section 211(G) of the Economic Stabilization Act, as amended, 12 U.S.C. § 1904 note (Supp. 1977).

QUESTION PRESENTED

Must the Temporary Emergency Court of Appeals of the United States as a court of "exclusive original jurisdiction" hear the merits of the complaint, as amended, of Petitioner against the Respondent Railroad Commission of Texas seeking relief from an order of the Respondent which is in conflict with and thereby preempted by orders of the Administrator of the Emergency Natural Gas Act of 1977?

STATUTES INVOLVED

The statute involved is the Emergency Natural Gas Act of 1977, (the "Act") 15 U.S.C. Section 717 note (Supp. 1977), attached hereto as Appendix B. The jurisdictional provision of the Act, Section 10(b), which is at issue herein, provides:

> (b) Except with respect to enforcement of orders or subpenas [sic] under section 4(e), the Temporary Emergency Court of Appeals, established pursuant to section 211(b) of the Economic Stabilization Act of 1970, as amended, shall have exclusive original jurisdiction to review all civil cases and controversies under this Act, including any order issued, or other action taken, under this Act.

15 U.S.C. § 717 note (Supp. 1977).

STATEMENT OF THE CASE

The complaint, as amended (attached hereto as Appendix C), was filed by Lo-Vaca Gathering Company ("Lo-Vaca") against the Railroad Commission of Texas (the "Commission") in the Temporary Emergency Court of Appeals (the "TECA"). It sought to have certain orders of the Commission set aside primarily on the grounds that they conflicted with orders issued by the Administrator of the Act. The Commission's April 4, 1977 final order (the "Order") in Gas Utilities Docket No. 830/991 (attached hereto as Appendix D), directly conflicted with the orders of the Administrator of the Act and should have been preempted by Section 14 of the Act. Since the majority of the Court of TECA did not reach the merits of Lo-Vaca's action, Lo-Vaca feels it proper for this Court to assume that there was such a conflict.

The Order of the Commission regulated certain terms and conditions, most importantly the price or rate, for the interstate transportation and sale of natural gas by Lo-Vaca which was accomplished pursuant to the orders of the Administrator of the Act. The Order changed the price or rate Lo-Vaca was to receive under certain orders of the Administrator and thereby eliminated not only all of Lo-Vaca's profit, but part of the direct, out-of-pocket expenses associated with these transactions as a whole. This required Lo-Vaca to operate at a loss for the particular transactions after the fact. Even though the transactions which were approved and authorized by the Administrator of the Act have been completed, it is clear from ordering paragraph number 4 of the Order (Appendix D at 6) that Lo-Vaca will not be permitted to retain any profit on *any future sale or transportation of natural gas in interstate commerce* and depending upon the actual costs involved, Lo-Vaca would be required to operate at a loss. Under

these conditions, Lo-Vaca, in the exercise of good business judgment, cannot seek out or willingly enter into any transaction involving the interstate sale or transportation of natural gas if it has the alternative of using its pipeline capacity and supplies of gas for intrastate transactions under more favorable economic conditions. The majority opinion described the orders issued by the Commission in Gas Utilities Docket No. 830/991 in the following manner:

> The disputed Commission orders were issued in response, [sic] to action by the Administrator of the Act directing Lo-Vaca to transport natural gas through interstate pipelines to the northeastern section of the United States. [footnote omitted]

Appendix A at 2. With the exception of changing the word "through" to the word "to", Lo-Vaca could not agree more. Lo-Vaca is an intrastate pipeline which has provided gas flowing from the south and western portion of the United States to the northeast. Should the Order be permitted to stand, Lo-Vaca will have been penalized by an agency of a state government for having made such interstate sales of natural gas at a time when the Congress and President of the United States determined there to be a national emergency. Due to the national interest in these sales and in the effect of the Order on future interstate sales, this controversy should be considered by a federal forum. This was the intent of Congress in Section 10(b). The TECA, despite the express grant of jurisdiction for it to hear this specific type of controversy, has declined. While the Act has expired, the TECA's duty to hear this case and power to declare the Commission's Order invalid, has not.

The majority of the TECA felt its role in ruling on Lo-Vaca's complaint was that of an appellate court as opposed to that of a court of first resort, notwithstanding the

fact that the Act provides in Section 10(b) that the TECA has "exclusive original jurisdiction". The majority relied on its historical practice as well as on certain distinctions it was able to find in the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note (Supp. 1977, the "ESA"), to conclude that Congress by the use of the word "review" in Section 10(b), meant that the TECA should confine its jurisdiction to review only actions taken by the Administrator under the Act.

In his concurring opinion, Judge Jameson disagreed with the majority's determination that it lacked jurisdiction to hear the merits of the Petitioner's case. He wrote:

> I cannot escape the conclusion that if in fact the Railroad Commission entered an order which was in conflict of an Administrator of the Act providing 'for the allocation, emergency delivery, transportation, or purchase of natural gas', this would constitute a case for controversy arising under the Act. . . . .

Appendix A at 11. Thus, under Judge Jameson's interpretation, the TECA's jurisdiction was clearly not limited to only direct appeals from an order issued by the Administrator of the Act as the majority of the TECA held. Implicitly this statement recognizes the fact that the TECA should have found that it had jurisdiction to hear the cause on the basis of the pleadings and then upon a full hearing of the merits, either before the court or a master, determined whether the Commision's Order conflicted with the Administrator's orders. If this were not the correct procedure, the only forum for raising federal preemption under Section 14 of the Act would be a state district court, who similar to the majority opinion, might find that it could not hear the case since the TECA had "exclusive original jurisdiction."

REASONS FOR GRANTING THE WRIT

Writ of Certiorari should issue because (1) the Order has substantially interfered with the scheme of federal regulation of the sale and transportation of natural gas in interstate commerce under the Act and, if permitted to remain in effect, has the potential to impair Lo-Vaca's ability and willingness to sell and transport gas in interstate commerce in the future; (2) this is a case of first impression; and (3) there are important questions of statutory construction. The TECA dismissed the cause of action brought by Lo-Vaca for want of jurisdiction because the majority felt that the "practical considerations cry out for this construction of the Act" (Appendix A at 9). The only consideration which cries out for the construction of the Act adopted by the majority opinion in the TECA is its desire not to become responsible to hold trial level proceedings. A plain reading of Section 10(b) and the policy underlying the passage of the Act require a contrary construction.

There can be no doubt that the Emergency Natural Gas Act of 1977 was exactly as its title describes, a piece of emergency legislation designed to alleviate emergency conditions. It was required by the exigencies of the severe winter of 1977 and the shortage of natural gas, particularly in the northeastern part of the United States.

In Sections 6 and 14 of the Act Congress vested in the Administrator comprehensive powers to make emergency allocations of natural gas. The express language of Section 14 gives precedent to the orders of the Administrator should they be in conflict with the orders of any state or local government. Congress certainly did not intend to permit the implementation of a national emergency natural gas program to be thwarted by the action of any state or local government.

Absent an expeditious manner in which to resolve such conflicts, the power of the Administrator to take emergency steps in the public interest would have been severely restricted. Congress in passing Section 10(b) clearly wished to protect that power. Moreover, if there was no federal forum for resolving these conflicts, protection of the national interest could be delayed in the course of time consuming state district court procedures which may likewise become state appellate procedures. Alternatively, it seems entirely plausible that any court, other than the TECA, could also decline to hear the case on the grounds urged under the Act since the TECA was given "exclusive original jurisdiction."

Rather than give the Act the liberal construction its purpose demands, the majority opted for an extremely strict and controlled construction of Section 10(b). In summary, the TECA based its decisions on points 1, 2 and 3 below. Lo-Vaca maintains that these constitute an unduly strict construction of Section 10(b) in light of the emergency nature of the Act and that each of the points can just as easily be argued in reverse to conclude that the TECA does have jurisdiction. The contrary arguments are listed below as alternatives 1, 2 and 3.

> TECA Point 1. The use of the word "review" must have meant that the TECA would only be an appellate court.
>
> Lo-Vaca Alternative 1. While the TECA is an appellate court there is no reason that its functions be limited to solely appellate functions. The TECA has "exclusive original jurisdiction" which it must exercise regardless of any possible imperfection in linguistic symmetry. Just as this Court acts primarily as an appellate court, but it must on occasion also act as a court of "original and exclusive jurisdiction." 28

U.S.C. § 1251(a). Where Congress has made clear its desire for emergency action with regard to the nation's natural gas shortage and the TECA has become an important element in that scheme it should not pass its responsibility by standing behind its own view of what it should be.

TECA Point 2. By analogy to Sections 210(a) and 211(a) of the ESA, the TECA's jurisdiction is limited to only those actions which would constitute or be direct administrative type appeals from orders or actions of the Administrator of the Act.

Lo-Vaca Alternative 2. Congress has determined that civil actions arising under the ESA should be divided into two distinct categories — those which were essentially administrative appeals as described in Section 211(a) of the ESA and those which were private causes of action against another private party as described in Section 210(a) of the ESA. In contrast to the ESA, the Act primarily distinguishes between civil and criminal actions arising under the Act. The following statement found in the joint explanatory statement of the Committee of Conference with respect to the Act highlights this distinction:

> Section 10 of the bill was modified to insure that criminal prosecutions under the Act were heard in the District Courts as opposed to the Temporary Emergency Court of Appeals by the addition of the word 'civil' before the words 'cases and controversies' in Section 10.

H.R. Conf. Rep. 95-7, 95th Cong. (1977), Appendix B at 9.

The logical conclusion from the above statement is that Congress did not want to burden the TECA with

the criminal prosecutions under the Act, but did want the TECA to have the responsibility for all civil matters. Thus, by analogy to Sections 210 and 211 of the ESA, Congress must have intended to have the TECA have exclusive original jurisdiction of all civil cases and controversies under the Act since the Act so states.

TECA Point 3. Congress intended by its use of the word "including" to limit the phrase "all civil cases and controversies under this Act" to only administrative type appeals.

Lo-Vaca Alternative 3. The word "including" in Section 10(b) is not a word of limitation rather it should be interpreted as pointing out certain but not all areas within the "exclusive original jurisdiction" of the TECA. This is particularly true when considered in light of the Congressional intent and the conditions and time in which the Act was passed.

Apart from the foregoing, the practical, as well as the policy considerations cry out for the more liberal construction which requires the TECA to take and exercise its exclusive original jurisdiction over a complaint challenging an order of a state regulatory commission which (i) penalized Lo-Vaca for selling and transporting gas in interstate commerce, (ii) was in direct conflict with the orders of the Administrator under the Act, and (iii) may have an effect on LoVaca's ability and willingness to engage in interstate sales and transportation of natural gas in the months ahead.

CONCLUSION

The Temporary Emergency Court of Appeals erred in dismissing the Petitioner's complaint, as amended, for lack of jurisdiction. For this reason this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, counsel of record for Petitioner hereby certify that on this 7th day of December, 1977, I have mailed postage prepaid copies of the foregoing to counsel for Respondent.

.....
Jefferson D. Giller

APPENDIX A

Temporary Emergency Court of Appeals of the United States

No. 5-23

LO-VACA GATHERING COMPANY, PLAINTIFF,

v.

THE RAILROAD COMMISSION OF TEXAS, DEFENDANT.

(Argued September 23, 1977 Decided October 19, 1977)

JEFFERSON D. GILLER, Fulbright & Jaworski, Houston, Texas, with whom William B. Wagner and Daniel K. Hedges, of the same firm; and William T. Hurn and Richard A. Wells, Lo-Vaca Gathering Company, Houston, Texas, were on the brief for the Plaintiff.

DAVID J. HUGHES, Assistant Attorney General, Austin, Texas, with whom John L. Hill, Attorney General of Texas, were on the brief for the Defendant.

Before CHRISTENSEN, INGRAHAM and JAMESON, Judges.

INGRAHAM, Judge.

Plaintiff, Lo-Vaca Gathering Company (Lo-Vaca) operates a natural gas pipeline for the purchase, transportation and sale of natural gas in Texas. Lo-Vaca is an "intrastate pipeline" as that term is defined in § 2(3)[1] of

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[1] An intrastate pipeline is any person (*other than an interstate pipeline*) engaged in the transportation by pipeline of natural gas. 15 U.S.C. § 717 note (Supp. I 1977). An interstate pipeline, as defined in the Natural Gas Act is "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." 15 U.S.C. § 717a(6) (1976). The Natural Gas Act defines "interstate commerce" in the following manner:

> "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between

the Emergency Natural Gas Act of 1977 (ENGA). Defendant, Railroad Commission of Texas, is an agency of the State of Texas charged with regulating the production and sale of natural gas in Texas. Lo-Vaca filed this original action in the Temporary Emergency Court of Appeals (TECA) under § 10(b)[2] of the ENGA, seeking to have certain orders of the Railroad Commission set aside.

The disputed Commission orders were issued in response, to action by the Administrator of the Act directing Lo-Vaca to transport natural gas through interstate pipe lines to the northeastern section of the United States.[3] The effect of the orders was to freeze the expenditure of a portion of the revenues collected by Lo-Vaca from these

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points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

15 U.S.C. § 717a(7).

[2] Section 10(b) provides in pertinent part:

> (b) Except with respect to enforcement of orders or subpenas (sic) under section 4(e), the Temporary Emergency Court of Appeals, established pursuant to section 211(b) of the Economic Stabilization Act of 1970, as amended, shall have exclusive original jurisdiction to review all civil cases and controversies under this Act, including any order issued, or other action taken, under this Act.

15 U.S.C. § 717 note (Supp. I 1977).

[3] The Railroad Commission claimed authority under TEX. REV. CIV. STAT. ANN. art. 6053 § 1 (1962) to determine if any revenue above costs or any unexpected revenues are being received by a gas utility and to order the appropriate disposition thereof. Any question as to the extent of the Railroad Commission's statutory authority is not reached on this appeal.

interstate contracts.[4] The gist of Lo-Vaca's complaint is that the Railroad Commission orders conflict with § 6[5] of the ENGA and are therefore preempted by § 14[6] of the Act. In order to reach the merits of the Railroad Commission orders, we must first find jurisdiction under the provisions of the Act.

Section 10(b) of the ENGA provides that TECA "shall have exclusive *original* jurisdiction to *review* all civil cases and controversies under [the ENGA], including any order issued, or other action taken, under this Act." 15 U.S.C. § 717 note (Supp. I 1977) (emphasis added). The Railroad Commission has filed a motion to dismiss for lack of jurisdiction, arguing that TECA is limited to the "review" of federal agency orders and other actions taken by the Administrator under the Act. Therefore, the Act

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[4] Because of our disposition of this case, it is unnecessary to chart the tortuous procedural history of the Railroad Commission orders, or to detail the provisions of the final, court-approved order.

[5] Section 6(a) provides in pertinent part:

> The President may authorize any interstate pipeline . . . to contract, upon such terms and conditions as the President determines to be appropriate (including provisions respecting fair and equitable prices), for emergency supplies of natural gas for delivery before August 1, 1977—
>
> . . .
>
> (2) from any intrastate pipeline . . . .

15 U.S.C. § 717 note (Supp. I 1977).

[6] Section 14 provides:

> Any order issued pursuant to this Act shall preempt any provision of any program for the allocation, emergency delivery, transportation, or purchase of natural gas established by any State or local government if such program is in conflict with any such order.

15 U.S.C. § 717 note (Supp. I 1977).

does not comprehend review of a state regulatory commission order.

Lo-Vaca seizes upon the word "original," in arguing that TECA can hear any "original" complaint subject only to the restriction that it be a case or controversy arising under the Act. According to Lo-Vaca, this category would include an order of a state regulatory commission.

The ambiguity on the face of the Act is patent. Combined with the fact that no case has yet been decided under the Act, it becomes necessary for us to delve into the legislative history of this provision, and to compare it to those of other enactments granting jurisdiction to TECA.

TECA was established by the Economic Stabilization Act of 1970 (ESA). 12 U.S.C. § 1904 note (Supp. 1977). It was given the powers of a circuit court of appeals to hear appeals from the district courts in certain cases and controversies arising under the Act. *Id.* § 211. Subsequently, the Emergency Petroleum Allocation Act (EPAA) was enacted. 15 U.S.C. § 751, *et seq.* (1976). The EPAA extended the jurisdiction of TECA to all appeals under its provisions by incorporation of § 211 of the ESA. *Id.* § 754. Thus, since the time of its creation, TECA has served as an appellate tribunal.[7]

The role of TECA under the ENGA has been altered. TECA retains its former character as an appellate court insofar as it reviews district court orders arising under

[7] *But see Exxon Corporation v. Federal Energy Administration*, 516 F.2d 1397 (TECA 1975), in essentially different context.

§ 4(e)[8] of theAct. *Id.* § 10(b). For all other cases over which it has jurisdiction under the Act, TECA has replaced the district court as the court of first resort. The statutory grant of jurisdiction to TECA under § 10(b) of the ENGA, therefore, parallels that given the district court under § 211 of the ESA. Thus, it is helpful to examine the power of the district court under the ESA.

The ESA gave the district court jurisdiction over two distinct types of actions. Section 210(a)[9] of the ESA created a private cause of action against another private party for any person suffering legal wrong under the statute. *Griffin v. United States*, 537 F.2d 1130, 1134-36 (TECA 1976). Section 211(a)[10] provided a separate legal remedy, one for plaintiffs subject to price controls who have a complaint against the enforcing agency, or for

[8] Section 4(e) gives the President extensive powers of discovery. 15 U.S.C. § 717 note (Supp. I 1977). The district court retains the power to enforce or refuse to enforce orders for discovery, subject to review by TECA.

[9] Section 210(a) of the ESA provides:

> (a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

12 U.S.C. § 1904 note (Supp. 1977).

[10] Section 211(a) of the ESA provides in pertinent part:

> (a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder.

12 U.S.C. § 1904 note (Supp. 1977).

other plaintiffs who have been aggrieved by former decisions or orders that denied administrative relief to which they believe they were entitled under the Act and implementing regulations. *Air Products & Chemicals, Inc. v. United Gas Pipe Line Co.*, 503 F.2d 1060, 1063 (TECA 1974). This latter type of action constitutes a "review" of agency action or decision making.

Though both courts entertain original complaints, the jurisdiction of TECA under the ENGA is not so broad as that of the district court under the ESA. The ENGA provides this § 211 or administrative remedy in § 10(b). The ENGA does not contemplate a private remedy like that set out in § 210 of the ESA. Lo-Vaca cites *Manning v. University of Notre Dame du Lac*, 484 F.2d 501 (TECA 1973), for the proposition that the ESA gave the district court power to hear cases initiated by an original complaint. Lo-Vaca concludes by analogy that TECA can also hear such a case under the ENGA. What Lo-Vaca fails to disclose, however, is that *Manning* was initiated under § 210 of the ESA, not § 211. If the ENGA had created a private cause of action like that provided in § 210 of the ESA, it is arguable that TECA would have jurisdiction to hear an original complaint under the ENGA. This argument is precluded by the fact that the ENGA envisioned no such private cause of action.

This conclusion is buttressed by the language of § 10(b) itself. Congress would not have used the word "review" if it had envisioned TECA taking jurisdiction of an original complaint. Viewed in this manner, the use of the word "original" can be reconciled with the word "review." TECA has original jurisdiction only in the sense that it has replaced the district court as the first court of law to review certain cases.

Granted that TECA is confined to the "review of existing cases and controversies under the ENGA, the

question remains—what types of cases can the court review? Section 10(b) extends jurisdiction to:

> "(1) cases and controversies under this Act,
>
> (2) including any order issued, or other action taken under this Act."

15 U.S.C. § 717 note (Supp. I 1977). Relying largely upon legislative history, the Commission argues that category (1) is no larger than category (2)—that TECA can only review orders issued and action taken under the Act. Since the Commission's orders were not orders issued or action taken under the Act, TECA has no jurisdiction.

Lo-Vaca contends that unless the word "including" is to be stripped of its meaning, category (1) must be inclusive of and broader than category (2). Therefore, the jurisdiction of TECA extends beyond the review of orders issued or action taken under the Act to any case or controversy arising under the Act. According to Lo-Vaca, since its suit hinges upon an interpretation of the Act, it arises from the Act and TECA has exclusive original jurisdiction to hear the case.

The Commission has the better argument on this phase of the issue also. Section 211 of the ESA has been interpreted to grant jurisdiction only for review of federal administrative decisions, or action taken under the Act. *See Air Products & Chemicals, Inc. v. United Gas Pipeline Co.*, 503 F.2d at 1063 (TECA 1974). As can be seen, § 211 of the ESA and § 10(b) of the ENGA are almost identical. Section 211 gives the court:

> "exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder."

12 U.S.C. § 1904 note (Supp. 1977). Section 10(b) gives the court:

> "exclusive original jurisdiction to review all civil cases and controversies under this Act, including any order issued, or other action taken, under this Act."

15 U.S.C. § 717 note (Supp. I 1977). Therefore, since § 211, without § 210, confines jurisdiction to review of regulations or orders issued under the ESA, it is reasonable to conclude that Congress intended to restrict § 10(b) of the ENGA in a similar manner.

The legislative history of § 10(b) reenforces this conclusion. As originally introduced in each house of Congress, § 10(b) gave TECA:

> "exclusive original jurisdiction to review any order issued or other action taken under this Act."

123 CONG. REC. S. 1540 (daily ed. Jan. 26, 1977) (remarks of Sen. Stevenson).

The clear import of this language is to confine the jurisdiction of TECA to the review of action taken by the Administrator under the Act. There is no indication in the official explanation of the Act that any different meaning was ever intended. *See id.* S. 1544.

The phrase "cases or controversies arising under the Act, including . . ." was added by Senator Stevenson in a technical amendment. *Id.* S. 1666-67 (daily ed. Jan. 31, 1977). No reason was given in the Congressional Record for the addition and no debate accompanied the change. *See id.* S. 1667. It can be assumed that no substantive change was contemplated.[11]

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[11] The Railroad Commission is probably correct in its statement that the "amendment operated only to conform the jurisdictional grant of § 10(b) to the basic requirements of federal jurisdiction as contained in Article III of the Constitution." Memorandum in Support of Motion to Dismiss of the Railroad Commission of Texas, page 5.

After studying the legislative history, the language of the Act, and judicial construction of acts similar to the ENGA, we find that Congress meant for TECA to have no jurisdiction over an original complaint challenging an order of a state regulatory commission.

Practical considerations cry out for this construction of the Act. Lo-Vaca admits there is only an original complaint before this court, and that no record exists from which an appellate argument can be made. Lo-Vaca would fill this void by transforming TECA into a trial level court to receive evidence and develop facts. We decline the invitation. We realize that Congress has extended our jurisdiction by cutting out the district court to provide direct review of agency action. We do not believe, however, that it was the intent of Congress to convert TECA into a trial level court for every cause of action arising under the ENGA.

The complaint should be dismissed for want of jurisdiction.

SO ORDERED.

JAMESON, Judge (Concurring).

I agree that the complaint should be dismissed. In spite of Judge Ingraham's well considered opinion, I have some question with respect to the conclusion that this court lacks jurisdiction. Even if the court has jurisdiction of the controversy, however, I am convinced that the complaint should be dismissed on the merits.

I agree with Judge Ingraham that the "ambiguity on the face of the Act is patent". The bill as introduced was clear. It provided in section 10(b):

> "Except with respect to enforcement or orders or subpoenas under section 4(e), the Temporary Emergency Court of Appeals shall have exclusive original jurisdiction to review any order issued, or other action taken, under this Act."

The bill was amended in the Senate to provide "exclusive jurisdiction to review all cases and controversies under this Act, including any order issued, or other action taken, under this Act". It was further amended in conference to insert the word "civil" before the words "cases and controversies".[1]

Lo-Vaca has alleged that the orders issued by the Railroad Commission are in conflict with sections 6 and 14 of the Act. Section 6 provides in pertinent part:

> "The President may authorize any interstate pipeline . . . to contract, upon such terms and conditions as the President determines to be appropriate (including provisions respecting fair and equitable prices), for emergency supplies of natural gas for delivery before August 1, 1977—" 15 U.S.C. § 717 note (Supp. I 1977).

Section 14 provides:

> "Any order issued pursuant to this Act shall preempt any provision of any program for the allocation emergency delivery, transportation, or purchase of natural gas established by any State or local government if such program is in conflict with any such order." 15 U.S.C. § 717 note (Supp. I 1977).

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[1] As the court's opinion has noted, no reason was given in the Congressional Record for the Senate Amendment. In explaining the Conference Report, Senator Pearson stated that the amendment was "to insure that the Temporary Emergency Court of Appeals review under section 10 would be limited to civil cases. Criminal cases would, as under other laws, be referred to Federal District Court for trial". 123 Cong. Rec. S 1999 (daily ed. Feb. 2, 1977).

I cannot escape the conclusion that if in fact the Railroad Commission entered an order which was in conflict with an order of an Administrator of the Act providing "for the allocation, emergency delivery, transportation, or purchase of natural gas", this would constitute a case or controversy arising under the Act. In my opinion, however, this is not such a case.

Lo-Vaca was ordered to transport gas pursuant to section 6 under terms deemed to be appropriate by the Administrator. One of these terms was the consideration Lo-Vaca was to receive. Lo-Vaca argues that the Commission, by virtue of its orders, has altered the amount Lo-Vaca will receive for transporting the natural gas. The order of the Commission, however, relates only to the disposition of the moneys received by Lo-Vaca. It does not change the amount of gas to be sold or transported or the amount to be paid under the contracts. As the Commission argues, its order merely directs Lo-Vaca's application of its revenues pursuant to the Commission's statutory power to establish fair and reasonable rates of charges for natural gas service. The order does not alter the terms of the contracts.

It is clear that the framers of the Act meant for state regulatory bodies to retain their regulatory power over interstate pipelines insofar as they do not conflict with the provisions of the Act. This intention was manifested in the provision of Section 6(c)(2): "Compliance by any pipeline with any order under this subsection shall not subject such pipeline to regulation under the Natural Gas Act. . ."

Nor does the final order of the Commission violate the preemption provision of Section 14. The order does not fall into any of the categories of preempted conduct. It does not seek to regulate the allocation, emergency delivery, transportation, or purchase of gas. The

Act does not proscribe the impounding of interstate revenues by a state regulatory body. The present order of the Commission does not interfere with either the transportation or price terms between the buyer and seller under the ENGA contracts. It is concerned only with the disposition of the revenues and is related to the Commission's power to regulate rates.[2]

All of Lo-Vaca's contentions with respect to the disposition of revenues received from the transportation of gas pursuant to orders under the ENGA have been asserted in an action pending in the state courts of Texas. In the final order entered by the Commission, Lo-Vaca was permitted to retain a part of the impounded revenues to cover its costs in making gas shipments pursuant to the federal orders. The remaining revenues were ordered credited to existing customers. The state court reversed that portion of the order and required that the revenues be held pending a full rate hearing. This decision has been appealed. In my opinion the propriety of the Commission's present order with respect to the disposition of the revenues received is properly before the Texas courts for resolution and should not be considered by this court. Accordingly I agree that the complaint should be dismissed.

[2] The cases upon which Lo-Vaca relies, *Northern Natural Gas Co.* v. *State Corp. Comm'n of Kansas*, 372 U.S. 84 (1963) and *FPC* v. *Corp. Comm'n of Oklahoma*, 362 F.Supp. 522 (W.D. Okla.), *aff'd* 415 U.S. 961 (1974) are distinguishable. The orders in both cases clearly interfered with the comprehensive federal regulatory scheme established in the Natural Gas Act and if allowed to stand would have frustrated the purposes of the Act.

APPENDIX B

PUBLIC LAW 95-2 [S. 474]: Feb. 2, 1977

EMERGENCY NATURAL GAS ACT OF 1977

For Legislative History of Act, see p. 3

An Act to authorize the President of the United States to order emergency deliveries and transportation of natural gas to deal with existing or imminent shortages by providing assistance in meeting requirements for high-priority uses; to provide authority for short-term emergency purchases of natural gas; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Emergency Natural Gas Act of 1977".

Emergency Natural Gas Act of 1977.
15 USC 717 note.

DEFINITIONS

15 USC 717 note.

SEC. 2. As used in this Act:

(1) The term "high-priority use" means—

(A) use of natural gas in a residence;

(B) use of natural gas in a commercial establishment in amounts of less than 50 Mcf on a peak day; or

(C) any other use of natural gas the termination of which the President determines would endanger life, health, or maintenance of physical property.

15 USC 717a.

(2) The term "interstate pipeline" means any natural-gas company, as defined in section 2(6) of the Natural Gas Act, which is engaged in the transportation by pipeline of natural gas.

(3) The term "intrastate pipeline" means any person (other than an interstate pipeline) engaged in the transportation by pipeline of natural gas.

(4) The term "interstate natural gas" means natural gas (other than natural gas transported pursuant to a transportation certificate issued under 18 C.F.R. 2.79) transported by an interstate pipeline in a facility which is certificated under the Natural Gas Act or which would be required to be so certificated but for section 1(c) of such Act.

15 USC 717w.
15 USC 717.

(5) The term "local distribution company" means any person (including a governmental entity) which receives natural gas for local distribution and resale to natural gas users.

(6) The term "antitrust laws" means the Sherman Act (15 U.S.C. 1 et seq.), the Clayton Act (15 U.S.C. 12, 13, 14–19, 20, 21, 22–27), the Federal Trade Commission Act (15 U.S.C. 41 et seq.), sections 73 and 74 of the Wilson Tariff Act (15 U.S.C. 8–9), and the Act of June 19, 1936, chapter 592 (15 U.S.C. 13, 13a, 13b, and 21a), and similar State laws.

(7) The term "State" means any State of the United States and the District of Columbia.

PRESIDENTIAL DECLARATION

Natural gas emergency.
15 USC 717 note.

SEC. 3. The President may declare a natural gas emergency if he finds that a severe natural gas shortage endangering the supply of natural gas for high-priority uses exists or is imminent in the United States or in any region thereof and that the exercise of his authorities under section 4 is reasonably necessary, having exhausted other remedies to the maximum extent practicable, to assist in meeting requirements for such uses. Such emergency shall be terminated when the President finds that such shortages no longer exist and are no longer imminent.

Termination.

EMERGENCY DELIVERIES AND TRANSPORTATION OF NATURAL GAS

SEC. 4. (a)(1) If the President finds it necessary to assist in meeting the requirements for high-priority uses of natural gas (including short-term storage replenishment or injection for protection of high-priority uses), on the basis of a notification by the Governor of any State pursuant to subsection (c) or on the basis of other information available to the President, the President may, during a natural gas emergency declared under section 3, by order, require— 15 USC 717 note.

Requirements for delivery by interstate or intrastate pipelines.

(A) any interstate pipeline to make emergency deliveries of, or to transport, interstate natural gas to any other interstate pipeline or to any local distribution company served by an interstate pipeline for purposes of meeting such requirements;

(B) any intrastate pipeline to transport interstate natural gas from any interstate pipeline to another interstate pipeline or to any local distribution company served by an interstate pipeline for purposes of meeting such requirements; or

(C) the construction and operation by any pipeline of any facilities necessary to effect such deliveries or transportation.

No such delivery or transportation may continue after April 30, 1977, or after the President terminates the emergency declared under section 3, whichever is earlier.

Order, restrictions.

(2) No order may be issued under this subsection unless the President determines that such order will not—

(A) create for the interstate pipeline delivering interstate natural gas a supply shortage which will cause such pipeline to be unable to meet the requirements for high-priority uses served, directly or indirectly, by such pipeline;

(B) result in a disproportionate share of deliveries or curtailments of natural gas experienced by such interstate pipeline when compared to deliveries and resulting curtailments which are experienced as a result of orders applicable to other interstate pipelines (as determined by the President); and

(C) require transportation of natural gas by any pipeline in excess of its available transportation capacity.

Alternative fuel, availability.

(3) In issuing such order the President shall also consider the relative availability of alternative fuel to users of the interstate pipeline ordered to make deliveries pursuant to this section.

(b) Compliance by any pipeline with an order issued under subsection (a) shall not subject such pipeline to regulation under the Natural Gas Act (15 U.S.C. 717 et seq.) or to regulation as a common carrier under any provision of State or Federal law. No action required to be taken under an order issued under subsection (a) shall be subject to any provision of the Natural Gas Act and any such order shall supersede any provision of a certification, or other requirement, under the Natural Gas Act which is inconsistent with such order.

Notification of shortage by State Governor.

(c)(1) The Governor of any State may notify the President of any finding by such Governor that a shortage of natural gas within such State, endangering the supply of natural gas for high-priority uses, exists or is imminent and that the State, and agencies and instrumentalities thereof, have exercised their authority to the fullest extent practicable and reasonable under the circumstances to overcome such shortage.

(2) The Governor shall submit, together with any notification under paragraph (1), information upon which he has based his finding under such paragraph, including—

(A) volumes of natural gas required to meet the requirements for high-priority uses in such State;

(B) information received from persons in the business of producing, selling, transporting, or delivering natural gas in such State as to the volumes of natural gas available in such State; and

(C) such other information as the Governor determines appropriate to apprise the President of emergency deliveries and transportation of interstate natural gas needed in such State.

(d) The President may request that representatives of interstate pipelines, intrastate pipelines, local distribution companies, and other persons meet and provide assistance to the President in carrying out his authority under this section.

Authority to obtain information.

(e)(1) In order to obtain information to carry out his authority under this Act, the President may—

(A) sign and issue subpenas for the attendance and testimony of witnesses and the production of books, records, papers, and other documents;

(B) require any person, by general or special order, to submit answers in writing to interrogatories, requests for reports or for other information, and such answers shall be made within such reasonable period, and under oath or otherwise, as the President may determine; and

(C) secure, upon request, any information from any Federal department or executive agency.

Compliance order.

(2) The appropriate United States district court may, upon petition of the Attorney General at the request of the President, in the case of refusal to obey a subpena or order of the President issued under this subsection, issue an order requiring compliance therewith, and any failure to obey an order of the court may be punished by the court as a contempt thereof.

Compensation. Hearing; supplemental order.

(f)(1) If the parties to any order issued under subsection (a) fail to agree upon the terms of compensation for deliveries (which may include compensation in kind) or transportation required pursuant to such order, the President, after a hearing held either before or after such order takes effect, shall, by supplemental order, prescribe the amount of compensation (which may include compensation in kind) to be paid for such deliveries or transportation and for any other expenses incurred in delivering or transporting such gas.

(2) If, for the purpose of a supplemental order pursuant to paragraph (1), the party making emergency deliveries pursuant to subsection (a)—

(A) indicates a preference for compensation in kind, the President shall direct that compensation in kind be provided by August 1, 1977, to the maximum extent practicable,

(B) indicates a preference for compensation, or the President determines pursuant to paragraph (A) of this subsection that any portion thereof cannot practicably be compensated in kind, the President shall calculate the amount of compensation for deliveries of natural gas, based upon the amount required to make the interstate pipeline delivering such natural gas and its local distribution companies whole for loss of sales resulting therefrom; including the actual amount paid by such interstate pipeline or any of its local distribution companies for the volumes of natural gas or higher cost gas such as synthetic natural gas which were needed to replace natural gas delivered pursuant to an order under subsection (a); and for transportation, storage, and other expenses, based upon reasonable costs, as determined by the President.

(g) In order to effect the purposes of this Act, the President shall monitor the operation of any order made pursuant to this section to assure that natural gas delivered pursuant to this section is applied to high-priority uses only.

Delivery to high-priority users only.

ANTITRUST PROTECTIONS

SEC. 5. (a) There shall be available as a defense for any person to civil or criminal action brought for violation of the antitrust laws (or any similar law of any State) with respect to any action taken or meeting held pursuant to a request or order of the President under section 4 (a) or (d) of this Act, if—

15 USC 717 note.

(1) such action was taken or meeting held solely for the purpose of complying with the President's request or order;

(2) such action was not taken for the purpose of injuring competition; and

(3) such person complied with the requirements of subsection (b) of this section.

Persons interposing the defense provided by this subsection shall have the burden of proof, except that the burden shall be on the person against whom the defense is asserted with respect to whether the actions were taken for the purpose of injuring competition.

(b) A meeting held pursuant to a request by the President under section 4(d) or pursuant to an order under section 4(a) complies with the requirements of subsection (a) if—

(1) there is present at such meeting a full-time Federal employee designated for such purposes by the Attorney General;

(2) a full and complete record of such meeting is taken and deposited, together with any agreements resulting therefrom, with the Attorney General, who shall make it available for public inspection and copying;

(3) the Attorney General and the Federal Trade Commission have the opportunity to participate from the beginning in the development and carrying out of agreements and actions under sections 4(a) and 4(d), in order to propose any alternative which would avoid or overcome, to the greatest extent practicable, possible anticompetitive effects while achieving substantially the purposes of this Act; and

(4) such other procedures as may be specified in such request or order are complied with.

EMERGENCY PURCHASES

SEC. 6. (a) The President may authorize any interstate pipeline or local distribution company served by an interstate pipeline (or class or category of such pipelines or companies) to contract, upon such terms and conditions as the President determines to be appropriate (including provisions respecting fair and equitable prices), for emergency supplies of natural gas for delivery before August 1, 1977—

15 USC 717 note.

(1) from any producer of natural gas (other than a producer who is affiliated with the purchaser as determined by the President) if (A) such natural gas is not produced from the Outer Continental Shelf and (B) the sale or transportation of such gas was not, immediately before the date on which such contract was entered into, certificated under the Natural Gas Act, or

15 USC 717w.

(2) from any intrastate pipeline, local distribution company, or other person (other than in interstate pipeline or a producer of natural gas).

Emergency purchase contract; court approval.

15 USC 717w.

The President may not authorize any emergency purchase contract under this subsection for emergency supplies of natural gas for sale and delivery from any intrastate pipeline which is operating under court supervision as of January 1, 1977, unless the court approves.

(b)(1) The provisions of the Natural Gas Act shall not apply—

(A) to any sale of natural gas to an interstate pipeline or local distribution company under the authority of subsection (a) or to any transportation by an intrastate pipeline in connection with any such sale; or

(B) to any natural gas company (within the meaning of the Natural Gas Act) solely by reason of any such sale or transportation.

(2) In exercising its authority under the Natural Gas Act, the Federal Power Commission shall not disallow, in whole or in part, recovery by any interstate pipeline, through the rates and charges made, demanded, or received by such pipeline, the amounts actually paid by it for natural gas purchased, transported, or other costs incurred pursuant to subsection (a).

(c)(1) The President may, by order, require any pipeline to transport such natural gas, and to construct and operate such facilities for transportation of natural gas, as may be necessary to carry out contracts authorized under subsection (a). The costs of any such required construction shall be paid by the party receiving such natural gas. No such order shall require any pipeline to transport any natural gas in excess of such pipeline's available capacity.

(2) Compliance by any pipeline with any order under this subsection shall not subject such pipeline to regulation under the Natural Gas Act or to regulation as a common carrier under any provision of State law.

"Outer Continental Shelf."

(d) As used in this section, the term "Outer Continental Shelf" has the same meaning as such term has under section 2 of the Outer Continental Shelf Lands Act (43 U.S.C. 1331).

ADJUSTMENT IN CHARGES FOR LOCAL DISTRIBUTION COMPANIES

15 USC 717 note.

SEC. 7. Compensation received by an interstate pipeline pursuant to section 4 in excess of the amount such pipeline would have charged its local distribution companies shall be credited to such local distribution companies in proportion to their share of any natural gas not delivered together with credits necessary to make whole any local distribution company which replaced such natural gas with higher cost gas such as synthetic natural gas as prescribed in section 4(f)(2)(B). Compensation paid by an interstate pipeline for deliveries or emergency purchases of natural gas pursuant to section 4 or section 6 shall be charged to such interstate pipeline's local distribution companies in proportion to their share of such natural gas deliveries or purchases.

RELATIONSHIP TO NATURAL GAS ACT

15 USC 717 note.

SEC. 8. Except as expressly provided in this Act, nothing contained in this Act shall be interpreted to change, modify, or otherwise affect rules, regulations, or other regulatory requirements or procedures of the Federal Power Commission pursuant to the provisions of the Natural Gas Act.

15 USC 717w.

EFFECT OF CERTAIN CONTRACTUAL OBLIGATIONS

of any act or omission that such act was taken or that such omission occurred for purposes of complying with any order issued under section 4(a).

(b) Any contractual provision—

(1) prohibiting the sale or commingling of natural gas subject to such contract with natural gas subject to the provisions of the Natural Gas Act, or

(2) terminating any obligation under any such contract as a result of such sale or commingling,

is hereby declared against public policy and unenforceable with respect to such natural gas if an order under section 4(a) or an authorization under section 6(a) applies to the delivery, transportation, or contract for supplies of such natural gas.

Prohibition of sale or commingling of natural gas.

(c) The amounts and prices of any natural gas purchases pursuant to an order under section 4(a), an authorization under section 6(a), or a contract entered into pursuant to 18 C.F.R. 2.68 after the date of the enactment of this Act and before August 1, 1977, shall not be taken into account for purposes of any contractual provision which determines the price of any natural gas (or terminates the contract for the sale of natural gas) on the basis of sales of other natural gas.

ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW

SEC. 10. (a) Subchapter II of chapter 5 of title 5 of the United States Code (other than sections 554, 556, and 557 thereof) shall apply to orders and other actions under this Act.

15 USC 717 note.
15 USC 551.

(b) Except with respect to enforcement of orders or subpenas under section 4(e), the Temporary Emergency Court of Appeals, established pursuant to section 211(b) of the Economic Stabilization Act of 1970, as amended, shall have exclusive original jurisdiction to review all civil cases and controversies under this Act, including any order issued, or other action taken, under this Act. The Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under section 4(e) of this Act; such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

12 USC 1904 note.

Filing of notice of appeal.

(c) Prior to a final judgment, no court shall have jurisdiction to grant any injunctive relief to stay or defer the implementation of any order issued, or action taken, by the President under this Act.

ENFORCEMENT

SEC. 11. (a) Any person who violates an order or supplemental order issued under section 4 or an order under section 6(c) shall be subject to a civil penalty of not more than $25,000 for each violation of such order. Each day of violation shall constitute a separate offense.

15 USC 717 note.

(b) Any person who willfully violates an order or supplemental order issued under section 4 or an order under section 6(c) shall be fined not more than $50,000 for each violation of such order. Each day of violation shall constitute a separate violation.

(c) Whenever it appears to the President that any individual or organization has engaged, is engaged, or is about to engage in acts or practices constituting a violation of any order issued under section 4(a), any supplemental order issued under section 4(f), or any order under section 6(c), the President may request the Attorney General

Mandatory injunctions.

injunction shall be granted without bond. In any such action, the court may also issue mandatory injunctions commanding any person to comply with any such order or supplemental order.

REPORTING

Report to President.
15 USC 717 note.

SEC. 12. (a) In issuing any order under section 4(a) or granting any authorization under section 6, the President shall require that the prices and volumes of natural gas delivered, transported, or contracted for pursuant to such order or authorization shall be reported to him on a weekly basis and such reports shall be made available to the Congress.

Report to Congress.

(b) The President shall report to Congress not later than October 1, 1977, respecting his actions under this Act.

DELEGATION OF AUTHORITIES

15 USC 717 note.

SEC. 13. The President may delegate all or any portion of the authority granted to him under this Act to such executive agencies (within the meaning of 5 U.S.C. 105) or officers of the United States as he determines appropriate, and may authorize such redelegation as may be appropriate. Except with respect to section 552 of title 5 of the United States Code, any officer or executive agency of the United States to which authority is delegated or redelegated under this Act shall be subject only to such procedural requirements respecting the exercise of such authority as the President would be subject to if such authority were not so delegated.

PREEMPTION OF INCONSISTENT STATE OR LOCAL ACTION

15 USC 717 note.

SEC. 14. Any order issued pursuant to this Act shall preempt any provision of any program for the allocation, emergency delivery, transportation, or purchase of natural gas established by any State or local government if such program is in conflict with any such order.

Approved February 2, 1977.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 95-7 (Comm. of Conference).
CONGRESSIONAL RECORD, Vol. 123 (1977):
Jan. 26, 28, 31, considered and passed Senate.
Feb. 1, considered and passed House, amended.
Feb. 2, Senate and House agreed to conference report.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 13, No. 6:
Feb. 2, Presidential statement.

EMERGENCY NATURAL GAS ACT OF 1977

P.L. 95-2, see page 91 Stat. 4

House Conference Report No. 95-7, Feb. 2, 1977

[To accompany S. 474]

Cong. Record Vol. 123 (1977)

DATES OF CONSIDERATION AND PASSAGE

House February 1, 2, 1977

Senate January 31, February 2, 1977

No Senate or House Reports were submitted with this legislation.

HOUSE CONFERENCE REPORT NO. 95-7

* * * * * * * * * * *

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JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 474) to authorize the President of the United States to order emergency deliveries and transportation of natural gas to deal with existing or imminent shortages by providing assistance in meeting requirements for high-priority uses; to provide authority for short-term emergency purchases of natural gas; and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendments struck out all of the Senate bill after the enacting clause and inserted a substitute text, and the Senate disagreed to the House amendment.

The committee of conference recommends that the Senate recede from the disagreement to the amendment of the House, with an amendment which is a substitute for both the text of the Senate bill and the House amendment to the text of the Senate bill.

The text of the conference substitute is the same as the text of the Senate bill with four changes described below.

Section 2(2) of the Senate bill defines the term "interstate pipeline" as any person engaged in the transportation of interstate natural gas.

The conference substitute adopts the House language which defines the term "interstate pipeline" as any natural gas company, as defined in section 2(6) of the Natural Gas Act, which is engaged in the transportation by pipeline of natural gas.

Section 2(4) of the Senate bill defines "interstate natural gas" as natural gas which, but for this Act, is subject to the Natural Gas Act.

Section 2(4) of the conference substitute adopts the House language which defines "interstate natural gas" as natural gas (other than natural gas transported pursuant to a transportation certificate issued

ity certificated under the Natural Gas Act and adds at the end of the House language the following: "or which would be required to be so certificated but for section 1(c) of such Act".

Section 9(c) of the Senate bill provides that the amounts and prices of any natural gas purchased pursuant to an order under section 4(a) or an authorization under section 6(a) will not be taken into account for purposes of any contractual provision which determines the price of any natural gas (or terminates the contract for the sale of natural gas) on the basis of sales of other natural gas.

Section 9(c) of the conference substitute closely follows the Senate bill and the House amendment and provides that the amounts and prices of any natural gas purchases pursuant to an order under sec-

[page 10]

tion 4(a), an authorization under section 6(a), or a contract entered into pursuant to 18 C.F.R. 2.68 after the date of enactment of this Act and before August 1, 1977, shall not be taken into account for purposes of any contractual provision which determines the price of any natural gas (or terminates the contract for the sale of natural gas) on the basis of sales of other natural gas.

Section 10 of the bill was modified to insure that criminal prosecutions under the Act are heard in the district courts as opposed to the Temporary Emergency Court of Appeals by the addition of the word "civil" before the words "cases and controversies" in section 10.

The House conferees receded from the House position on the Eckhardt amendment, which appeared in section 6 (a) and (d)(1) of the House amendment (relating to reasonable prices), on the basis of the representations made by Dr. Schlesinger in his letter of January 31, 1977, to Senator Stevenson. The letter reads as follows:

THE WHITE HOUSE.
Washington, January 31, 1977.

Hon. ADLAI E. STEVENSON,
U.S. Senate,
Washington, D.C.

DEAR SENATOR STEVENSON: This is in response to your inquiry about the implementation of the "Fair and Equitable" price standard in Section VI of S. 474, the Emergency Natural Gas Act of 1977.

It is our intention to provide price certainty so that once a specific transaction has been authorized by the President, there would be no risk of a price roll-back for that transaction.

We believe a fair amount of flexibility is desirable to assure the maximum flow of natural gas to areas of shortage. Toward that end, we would expect to establish a threshold level, such as, for example, the price at which natural gas has recently been sold in intra-state commerce at which sales would be authorized by general rule and not subject to roll-back. Sales above that level might be subject to specific review. In any event, there would be no roll-back of the price for a specific transaction once it had been authorized by the President.

Sincerely,

JAMES R. SCHLESINGER,
Assistant to the President.

Similarly, the House conferees receded from the House position on the Breyhill amendment, which appeared in section 4 (a)(2) and (a)(3)(B) of the House substitute, on the basis of the representations

made by Dr. Schlesinger at the hearings before the Ad Hoc Subcommittee on Energy and Power of the Committee on Interstate and Foreign Commerce on January 28, 1977, in the following colloquy:

> I have been concerned that perhaps there are not enough guidelines in this bill to give some congressional intent and direction as to how you would carry out this allocation authority. It had been my purpose to offer an amendment that would tend to spell this out.
>
> Briefly, it would go like this: That your order, first, would be limited to the natural gas which would be expected to be burned as boiler fuel by users served by those interstate pipelines or distributing companies.
>
> [page 11]
>
> If no more fuel gas is available on any of these interstate pipelines, then the President could order the diversion of gas that would be going for priority number three and then if all gas in priority number three has been diverted, then the President can order the diversion of priority gas number two.
>
> I wonder if you would give your comment as to a plan of this kind for the orderly diversion of gas that might be available?
>
> Mr. SCHLESINGER. It will be the judgment of the Congress with regard to the specific powers given to the President. We intend to follow such orderly procedures as you have indicated in diverting gas from lower priority users and those pipelines still serving such users where the supplies are relatively abundant to those that are beginning to cut in or threaten to cut into priority one users.
>
> It would be my immediate reaction, since we are intending to follow such procedures, that if the Congress includes in the law those procedures in a rigorous way, that it might tie our hands in circumstances that it would not be the desire of the Congress to do.
>
> Mr. BROYHILL. Would you say that it is your intent to divert that gas that would ordinarily be burned as boiler fuel as your first order of diversion?
>
> Mr. SCHLESINGER. That would seem to be the appropriate thing to do. I would put it in a more general way, that throughout the East, we are down to priority two users at most, overall. In some places, in the West, priorities three, four, five and even higher, are being observed by interstate pipelines.
>
> So, quite naturally, the conclusion to be drawn is one that we need not spell out.

The conferees were of the view that, because of the fact that the bill was an emergency measure requested by the administration, it should not be regarded as a precedent for subsequent congressional action on matters to which the bill relates.

HARLEY O. STAGGERS,
JOHN D. DINGELL,
BOB ECKHARDT,
PHILIP R. SHARP.

ANTHONY TOBY MOFFETT,
JAMES T. BROYHILL,
CLARENCE J. BROWN,
Managers on the Part of the House.

ADLAI E. STEVENSON III,
J. BENNETT JOHNSTON,
JAMES B. PEARSON,
TED STEVENS,
ERNEST F. HOLLINGS,
Managers on the Part of the Senate.

APPENDIX C

TECA Docket No. 5-23

In The

Temporary Emergency Court of Appeals of The United States

Lo-Vaca Gathering Company,

Plaintiff,

v.

The Railroad Commission of Texas,

Defendant.

AMENDED COMPLAINT

To The Honorable Temporary Emergency Court of Appeals:

Comes Now Lo-Vaca Gathering Company ("Lo-Vaca"), Plaintiff, complaining of The Railroad Commission of Texas (the "Commission"), Defendant, and for cause of action would respectfully show unto this Honorable Court the following:

Jurisdiction and Venue

1. This is a suit by Lo-Vaca to set aside orders of the Commission for being in conflict with orders issued by the Administrator of the Emergency Natural Gas Act of 1977 (Pub. L. 95-2, hereinafter referred to as the "Act"). This Court has jurisdiction and venue of this cause under Section 10(b) of the Act which provides in part:

"The Temporary Emergency Court of Appeals, established pursuant to Section 211(b) of the Economic Stabilization Act of 1970, as amended, shall have exclusive original jurisdiction to review all civil cases and controversies under this Act, including any order issued, or other action taken, under this Act."

Parties

2. Lo-Vaca is a Delaware corporation duly authorized to transact business in the State of Texas, having its principal place of business at Five Greenway Plaza East, Houston, Harris County, Texas. Lo-Vaca operates a natural gas pipeline for the purchase, transportation and sale of natural gas in Texas. Lo-Vaca is an "intrastate pipeline" as that term is defined in Section 2(3) of the Act.

3. Defendant, The Railroad Commission of Texas, is a department and agency of the state Government organized and existing under the laws of the State of Texas, acting by and through Chairman Mack Wallace and Commissioners Jim C. Langdon and Jon Newton.

Facts

4. In February 1977 the Congress of the United States passed, and the President signed, the Act to help relieve human suffering and unemployment, especially in the northeastern part of the United States, created by the unusually cold weather and the natural gas shortage. Pursuant to the Act, its Administrator, Richard L. Dunham, ordered Lo-Vaca to transport gas for the account of third parties in interstate commerce between points of supply on the west side of Lo-Vaca's system to pipelines on the east side of Lo-Vaca's system. Lo-Vaca is a vital link connecting sources of gas in the western part of the United States with pipelines and consumers in the eastern part of the United States.

5. Lo-Vaca was ordered to transport gas for the account of Transcontinental Pipeline Company ("Transco") by the Administrator pursuant to Section 6 of the Act. Copies of the orders of the Administrator relating to the Transco transportation arrangement have been attached hereto as Exhibits 1, 2 and 3 and are incorporated herein for all purposes.

6. Lo-Vaca was ordered to transport gas for the account of Southern Natural Gas Company ("Southern") by the Administrator pursuant to Section 6 of the Act. Copies of the orders of the Administrator relating to the Southern transportation arrangement have been attached hereto as Exhibits 4, 5 and 6 and are incorporated herein for all purposes.

7. Lo-Vaca was ordered to transport gas for the account of Columbia Gas Transmission Company ("Columbia") by the Administrator pursuant to Section 6 of the Act. Copies of the orders of the Administrator relating to the Columbia transportation arrangement have been attached hereto as Exhibits 7, 8 and 9 and are incorporated herein for all purposes.

8. As set forth in the attached orders of Administrator Dunham the rates for the transportation of natural gas by Lo-Vaca were set in those orders.

9. The Commission, upon learning of these interstate transportation agreements, issued an order, dated February 7, 1977, in its Gas Utilities Docket ("G.U.D.") No. 830, which provided that Lo-Vaca could not spend for any purpose whatsoever any of the monies or revenue it received either from intrastate or interstate transportation of gas for third parties, pending final resolution of the docket. A copy of the February 7, 1977, order is attached hereto as

Exhibit 10 and is incorporated herein by reference for all purposes.

10. On February 22, 1977, Lo-Vaca timely filed its Motion for Rehearing of the February 7, 1977, order and on that same day two Examiners of the Commission conducted a hearing for the purpose of determining the disposition to be made of the transportation revenues.

11. On March 7, 1977, the Commission issued an order which rescinded its February 7, 1977, order insofar as it prevented expenditures by Lo-Vaca of revenues received from intrastate transportation of gas but continued in effect the prohibition against any use of revenues received from interstate transportation of gas made pursuant to the orders of Administrator Dunham. A copy of the March 7, 1977, order is attached hereto as Exhibit 11 and is incorporated herein by reference for all purposes. On the same day, the Commission also overruled Lo-Vaca's Motion for Rehearing of its February 7, 1977, order and set for a future date a hearing to futher examine certain components of the charges for interstate transportation of gas.

12. The Commission's February 7, 1977, order, as amended by its March 7, 1977, order has, in effect, impounded the funds Lo-Vaca has received and will in the future receive for the interstate transportation of natural gas pursuant to the orders of the Administrator pursuant to Section 6 of the Act. Such action by the Commission clearly transgresses its jurisdiction and invades the federal regulation of the interstate transportation of natural gas.

13. Combined Gas Utilities Docket Nos. 830 and 991 involve the above described interstate transportation of gas by Lo-Vaca and an emergency sale of gas by Lo-Vaca to Transco, also pursuant to the orders of the Administrator. In its application to the Commission with respect to that sale, Lo-Vaca volunteered that it would credit to its intrastate customers the difference between the price paid for the gas by Transco and the average cost of gas on the Lo-Vaca system. Lo-Vaca would keep for itself only eleven cents per MCF which equals the five cent charge authorized for intrastate sales by the Commission's Interlocutory Order of September 27, 1973, plus six cents for actual liquid loss. This was the same treatment authorized by the Commission on November 17, 1975, in G.U.D. 643 for an earlier sale to Transco, except in that earlier sale there was no loss of liquids to Lo-Vaca and therefore no credit to Lo-Vaca for loss of liquids. This treatment was also authorized for a subsequent sale to Northern Illinois Gas Company by the Commission in G.U.D. 643 on or about April 26, 1977. The application of Lo-Vaca with respect to the sale to Transco under the Act was approved by order of the Commission dated March 21, 1977. A copy of the March 21, 1977, order is attached hereto as Exhibit 12 and incorporated herein by reference for all purposes. The Transco sale was also approved by the 200th Judicial District Court of Travis County, Texas, Judge Matthews presiding, pursuant to the Act and to an Agreed Judgment entered in Cause No. 209,422, in the District Court of Travis County, Texas.

14. Following notice by the Commission, a hearing was held April 1, 1977, to examine the components of the charges for the interstate transportation and sales of natural gas by Lo-Vaca. On April 4, 1977, the Commission entered its Final Order in G.U.D.'s 830 and 991. A copy of the order is attached hereto as Exhibit 13. The Commission in its April 4, 1977, order allowed Lo-Vaca to retain its direct costs involved in the above described interstate transportations of natural gas -- those being the loss of

liquids and BTU loss components — plus the incremental transportation costs; not to exceed one cent per MCF. Similarly, the April 4, 1977, order allowed Lo-Vaca to retain its direct costs from the interstate sale to Transco. Under the April 4, 1977, order the balance of the revenues from the interstate transportation and sale of natural gas by Lo-Vaca is to be credited to its existing intrastate sales customers, by means of a reduction of the systemwide weighted average cost of gas. The April 4, 1977, order further required that any future revenues received by Lo-Vaca from the interstate sales or transportation of gas be similarly credited to the then existing intrastate sales customers on the Lo-Vaca system.

15. The most immediate and obvious effect of the impoundment of the interstate transportation revenues is to negate the interstate transportation rates set by Administrator Dunham. The Commission orders interfere with the Administrator's orders as to transportation and purchase of natural gas. Section 14 of the Act explicitly provides that orders of the Administrator pertaining to transportation and purchase of natural gas shall preempt any conflicting state orders. The Commission's actions are beyond its jurisdiction and contrary to the express purposes of the Act in that they create a reluctance on the part of Lo-Vaca to consider any future transportation arrangements under the Act. They have a direct, immediate, and pernicious effect on Lo-Vaca's operations, particularly its ability and willingness to actively pursue and accept further interstate transportation agreements under the Act. Thus, the Commission's actions affect not only Lo-Vaca, but may impede the flow of natural gas to areas of the United States, pipelines or utilities which may need such gas for homes and businesses or to replenish their reservoirs.

Federal Causes of Action
Count One

16. Section 14 of the Act provides that the orders of the Administrator shall preempt any provision of any program for the transportation of natural gas established by any State or local government if such program is in conflict with any such order. The Commission's February 7, 1977, order, as amended, and its April 4, 1977, order are in direct conflict with the Administrator's orders for the reasons previously pleaded. As the Act and orders of the Administrator preempt the Commission actions with respect to such interstate transportation arrangements, the orders of the Administrator should be enforced by declaring the Commission's February 7, 1977, order, as amended, and its April 4, 1977, order invalid insofar as they direct or in any manner affect the disposition or receipt of revenues by Lo-Vaca from the interstate transportation of gas ordered pursuant to Section 6 of the Act.

Count Two

17. The Commission's February 7, 1977, order, as amended, and its April 4, 1977, order constitute an unlawful interference with, and burden upon, interstate commerce. They improperly and unlawfully deprive Lo-Vaca of the use of revenues from the transportation and sale of natural gas in interstate commerce made pursuant to the orders of Administrator Dunham. They are clearly discriminatory in that they favor or encourage intrastate transportation and sales by not allowing Lo-Vaca to retain the interstate revenues to which it is entitled. Clearly, the impoundment of these revenues by the Commission (i) violates the protections of the Commerce Clause, U.S. CONST. art. I., sec. 8, by placing an impermissible burden on interstate commerce, and (ii) violates the Supremacy Clause, U. S. CONST. art.

VI, cl. 2, as it contravenes the Congressional mandate set forth in the Act.

18. Count Two is a federal cause of action and is properly before this Court. However, it would also be properly before a state court in Texas. Lo-Vaca has raised Counts Two, Three, and Four solely from an abundance of caution. Lo-Vaca has no desire to broaden the scope of the case before this Honorable Court beyond the single question of whether the Commission's actions impermissibly conflicted with the Administrator's orders. Therefore, Lo-Vaca respectfully urges the Court to dismiss Count Two without prejudice to Lo-Vaca's right to raise it before an appropriate state tribunal.

State Causes of Action

19. Causes of Action Three and Four are state law claims. Lo-Vaca presents these causes of action to this Honorable Court only out of an abundance of caution. Lo-Vaca urges this Court to dismiss Causes of Action Three and Four with prejudice so that they might be adjudicated in the appropriate state tribunal. Judicial economy, convenience and fairness to litigants do *not* require that these state law claims be determined by this Court. Therefore, in the interest of comity, to promote justice between the parties, and to procure a "surer-footed reading of applicable law," Causes of Action Three and Four should be dismissed without prejudice. See *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 726-727 (1966).

Count Three

20. The Commission's February 7, 1977, order, as amended, is invalid and should be set aside insofar as it

prohibits Lo-Vaca's use of revenues received for interstate transportation of gas for at least the following reasons:

A. It constitutes an invalid exercise of managerial control over Lo-Vaca's financial affairs, particularly the expenditure of revenues from unregulated activities.

B. It is in violation of constitutional and statutory provisions and is in excess of the statutory authority of the Commission. The power to prevent all use by Lo-Vaca of funds it receives from any source and particularly those from the interstate transportation of gas has not been granted the Commission by the Legislature of the State of Texas.

C. It constitutes action by the Commission which is an abuse of discretion in that, among other things, the Commission has placed a freeze upon funds of a gas utility which is not authorized by statute and which relates to interstate transactions over which the Commission clearly has no jurisdiction.

D. It is in violation of Section 37 of the Public Utility Regulatory Act (TEX. REV. CIV. STAT. ANN. art. 1446c) which provides in part:

> ". . . No rule or order of the regulatory authority shall be in conflict with the rulings of any federal regulatory body."

E. It is discriminatory, prejudicial, affected by other errors of law and is not reasonably supported by substantial evidence in view of the reliable and probative evidence in the record as a whole.

Count Four

21. The April 4, 1977, order, specifically ordering paragraphs 2, 3 and 4, is invalid and should be set aside insofar as it in any way affects the use or disposition by Lo-Vaca

of the revenues from interstate sales or transportation of natural gas pursuant to the orders of the Administrator for at least the following reasons.

A. It constitutes an unlawful exercise of managerial control over Lo-Vaca's financial affairs. It is well established that the Commission has only such powers as are expressly delegated to it, or which are necessary to the exercise of expressly delegated powers. None of the statutes cited by the Commission in its April 4, 1977, order delegate the powers the Commission is asserting in the April 4, 1977, order, nor can they reasonably be implied therefrom. It is fundamental that a regulatory agency may not, in the guise of regulation and without express statutory authority, extend its regulation so as to constitute management or operation.

B. It is in violation of constitutional and statutory provisions and in excess of the statutory authority of the Commission. The Commission is not charged with the duty, nor has it been given the power, to regulate or in any way affect rates for the transportation or sale of natural gas in interstate commerce. While the Commission appears to believe that its Interlocutory Order in G.U.D. 500 provides or is a license to manage Lo-Vaca's business, including unregulated non-jurisdictional operations, there is no statutory or constitutional authority for doing so.

C. It is and constitutes action on the part of the Commission which is an abuse of discretion. Moreover, it is discriminatory and prejudicial. There is no basis in the record, nor statutes empowering the Commission, to single out one utility, Lo-Vaca, and take away revenues obtained from its unregulated non-jurisdictional operations. No other utility in the State of Texas has been subjected to such limitation or scrutiny of its non-jurisdictional revenues and certainly not those arising out of the transportation or sale of natural gas pursuant to the orders of the Administrator.

D. It is discriminatory and an abuse of discretion in that the Commission used incremental cost as a basis for setting rules. The Commission has not heretofore used an incremental basis in any rate proceedings to Lo-Vaca's knowledge and clearly did not indicate that action of this nature was contemplated. Moreover, as there was no evidence introduced at the hearing as to the propriety of using incremental costing, there can be no substantial evidence, in view of the reliable and probative evidence in the record as a whole on which such procedure may be utilized.

E. It is arbitrary, an abuse of discretion, void for lack of adequate notice, in violation of constitutional and statutory provisions, not based on substantial evidence in the record as a whole and in excess of the statutory authority of the Commission in that it alters or changes the rate previously set by the Commission in its Interlocutory Order in G.U.D. 500. Although there was no notice that the Commission intended to modify or change Lo-Vaca's interim rate to its existing sales customers, there is no doubt that the effect of the April 4, 1977, order does change the interim rate Lo-Vaca is to charge its existing customers. If the Commission desires to change the interim rate, it is required by statute and by the Constitution of the State of Texas and the United States to give timely and adequate notice and provide an opportunity for a full hearing to Lo-Vaca and its customers. This was not done — therefore the change in rates was made upon unlawful procedure.

F. Its effect is to set a rate for the interstate transportation and sale of natural gas over which the Commission has no jurisdiction and which is confiscatory and contrary to the Commission's mandate from the Legislature

of the State of Texas as set forth in TEX. REV. CIV. STAT. ANN. arts. 1446c and 6053, to establish a fair and reasonable rate. While Lo-Vaca does not concede that the Commission has any jurisdiction whatsoever to set rates for interstate transportation and sales of natural gas, the Commission is nonetheless bound by the statutes set forth above and the Constitutions of the State of Texas and the United States to set a rate which is not confiscatory or less than just and reasonable.

G. It is in violation of Section 37 of the Public Utility Regulatory Act (TEX. REV. CIV. STAT. ANN. art. 1446c) which provides in part:

> ". . . no rule or order of the regulatory authority shall be in conflict with the rulings of any Federal Regulatory body."

As the rates for the subject transportation and sales of natural gas in interstate commerce to Transco and Columbia were set by the orders of the Administrator of the Emergency Natural Gas Act of 1977, the Commission's action is in direct conflict with such orders.

H. It is affected by other errors of law and is not reasonably supported by the substantial evidence in view of the reliable and probative evidence in the record as a whole.

Conclusion and Prayer

WHEREFORE, premises considered, Lo-Vaca prays that Counts Two, Three, and Four be dismissed without prejudice to Lo-Vaca's right to raise them before an appropriate state tribunal; that upon consideration of the merits of Count One or — if the Court does not dismiss the subsequent counts — on the merits of all four counts, that the orders of the Administrator of the Emergency Gas Act of 1977 be enforced; that Lo-Vaca be allowed to retain

and use the revenues received by it from the interstate transportation of natural gas without further interference by the Commission; that the Commission orders of February 7, 1977, as amended, and April 4, 1977, be held and declared invalid as they prohibit the use or otherwise affect the disposition and receipt of the revenues Lo-Vaca has and is to receive from the interstate transportation of natural gas pursuant to the orders of the Administrator; that Lo-Vaca have its costs of court, and such other and further relief, at law or in equity, general or special, to which it may be justly entitled.

Respectfully submitted,

.....
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APPENDIX D

RAILROAD COMMISSION OF TEXAS

GAS UTILITIES DIVISION

RE: LO-VACA GATHERING COMPANY

GAS UTILITIES

Docket Nos. 830 and 991

FINAL ORDER

The Railroad Commission of Texas, on its own motion, issued its Order and Notice Of Hearing on February 7, 1977, ordering that all gross income derived by Lo-Vaca Gathering Company from the for-hire transportation of natural gas be separately stated, identified and accounted for, and that no disposition or expenditure of said gross income be made pending final resolution of this matter after due notice and hearing. The Commission further Ordered that a hearing be called February 22, 1977, to determine the amount of gross revenues that have been and are to be derived by Lo-Vaca Gathering Company from the for-hire transportation of natural gas and to determine the disposition of these gross revenues most beneficial to existing sales customers of Lo-Vaca Gathering Company. A hearing was held on February 22, 1977, at which representatives of Lo-Vaca Gathering Company, Coastal States Gas Producing Company, City of Austin, Texas, City of San Antonio, Texas, Gulf Oil Corporation, and United Texas Transmission Company were in attendance. Lo-Vaca Gathering Company, Coastal States Gas Producing Company, the City of Austin, Texas, and the City of San Antonio, Texas, presented evidence and argument in support of their positions at this hearing.

On March 7, 1977, the Railroad Commission issued its Interim Order in Gas Utilities Docket No. 830 continuing and/or placing in suspension all revenues received from interstate transportation arrangements under the Emergency Natural Gas Act of 1977, and permitted the use of revenues from intrastate transportation operations for payment of the ordinary and necessary expenditures incurred in the operation of Lo-Vaca Gathering Company, pending final determination.

The assigned Examiners reviewed the record developed in Gas Utilities Docket No. 830 and were of the opinion that additional information was necessary for a proper resolution of the issues raised therein. Accordingly, the Railroad Commission called a hearing for March 22, 1977, specifically, to take evidence and argument on the exact nature of the BTU loss and loss of liquids compensation components contained in the transportation contracts under the Emergency Natural Gas Act of 1977 and, generally, for a fuller discussion of all matters or questions raised by Gas Utilities Docket No. 830.

On March 3, 1977, Lo-Vaca filed a pleading, amended on March 16, 1977, pursuant to the Commission's Order in Gas Utilities Docket No. 643, which was docketed as Gas Utilities Docket No. 991, wherein they informed the Commission of a proposed sale of natural gas to Transcontinental Gas Pipeline Corporation under the Emergency Natural Gas Act of 1977. Lo-Vaca noted in their pleading that since they are currently operating under court supervision, it was necessary under the Emergency Natural Gas Act of 1977 for them to obtain court approval before making the proposed sale.

On March 21, 1977, the Railroad Commission issued its Interim Order making no objection to the proposed sale,

provided that Lo-Vaca place into suspension revenues received exceeding the cost of gas, consistent with the Commission's March 7, 1977 action in Docket No. 830, pending final determination of both dockets. Additionally, the Commission issued its Order and Notice of Hearing on March 21, 1977, consolidating Gas Utilities Docket Nos. 830 and 991 for purpose of conducting a hearing on April 1, 1977, to review evidence and arguments on the exact nature of the BTU loss and loss of liquids compensation components contained in the transportation contracts under the Emergency Natural Gas Act of 1977 which are the subject of Docket No. 830, to receive fuller discussion of all matters or questions raised by Docket No. 830, and for a complete discussion of the nature of the loss of liquids compensation component and other revenues received under the sale of natural gas to Transcontinental Gas Pipeline Corporation by Lo-Vaca Gathering Company, the subject of Gas Utilities Docket No. 991.

Based on the evidence presented in the April 1, 1977 hearing on the consolidated Gas Utilities Docket Nos. 830 and 991, the Commission makes the following findings of fact, conclusions of law, and orders:

FINDINGS OF FACT

1. Lo-Vaca Gathering Company, through a system of transmission pipelines, purchases, transports for-hire, and sells natural gas within the State of Texas.

2. Lo-Vaca Gathering Company has been and is engaged in the transportation of natural gas through its system for the account of Transcontinental Gas Pipeline Corporation and Columbia Gas Transmission Company, and has been and is engaged in the selling of natural gas to Transcontinental Gas Pipeline Corporation.

3. Under the Transcontinental Gas Pipeline Corporation transportation contract, the fee received or to be received by Lo-Vaca Gathering Company is 18¢ per Mcf which is composed of 4.25¢ per Mcf designated by Lo-Vaca for loss of liquids compensation, 1.77¢ per Mcf designated by Lo-Vaca for BTU loss compensation, 5¢ per Mcf representing the cost of service charge under the September 27, 1973 Interlocutory Order in Gas Utilities Docket No. 500, and 6.98¢ per Mcf representing an increment above the aforementioned components.

4. Under the Columbia Gas Transmission Company transportation contract, the fee received by Lo-Vaca Gathering is 20¢ per Mcf which is composed of .71¢ per Mcf for loss of liquids compensation, 5¢ per Mcf representing the cost of service charge under the September 27, 1973 Interlocutory Order in Gas Utilities Docket No. 500, and 14.29¢ per Mcf representing an increment above the aforementioned components.

5. Under the sale of natural gas to Transcontinental Gas Pipeline Corporation by Lo-Vaca Gathering Company, which is the subject of Gas Utilities Docket No. 991, Lo-Vaca Gathering Company will assess a price of $2.20 per MMBTU which will be adjusted each month after the first month to reflect any increase in Lo-Vaca Gathering Company's average cost of the highest incremental 150 MMcf purchased in order to replace the volume sold to Transcontinental Gas Pipeline Corporation.

6. Lo-Vaca Gathering Company, under the sale of gas to Transcontinental will assess an additional 11¢ per Mcf handling charge which includes a 5¢ spread per Mcf, and a 6¢ per Mcf fee designated by Lo-Vaca to compensate Lo-Vaca Gathering Company for loss of revenue from the sale of liquids that would normally be made by Lo-Vaca Gathering Company.

7. For the period of January, 1977 through December, 1977, Lo-Vaca Gathering Company's intrastate transportation revenues will total approximately $20,779,000.

8. Lo-Vaca's incremental costs associated with the transportation of gas referenced in Findings of Fact 3 and 4 as well as the sale of gas referenced in Finding of Fact 5, are less than 5¢ per Mcf.

9. The revenues received by Lo-Vaca Gathering Company from the interstate operations which are the subject of Gas Utilities Docket Nos. 830 and 991, exclusive of incremental transportation cost of service, lost of liquids compensation, and Lo-Vaca's systemwide weighted average cost of gas determined pursuant to the Steptember 27, 1973 Interlocutory Order in Gas Utilities Docket No. 500, represent revenues not heretofore anticipated or considered by Lo-Vaca Gathering Company, its sales customers, or the Railroad Commission of Texas.

CONCLUSIONS OF LAW

1. Lo-Vaca Gathering Company is a gas utility within the meaning of TEX. REV. CIV. STAT. ANN. arts. 1446c, S3(c)(3) (Supp. 1976) and 6050 (1962).

2. The Railroad Commission of Texas has the authority pursuant to TEX. REV. CIV. STAT. ANN. arts. 1446c, § 19(c) (Supp. 1976) and 6053, § 1 (1962) to establish fair and reasonable rates of charges and regulations for natural gas service by gas utilities.

3. Inherent in the grant of authority under art. 6053, § 1, the Commission has the authority to determine if any revenues above costs or any unexpected revenues are being received by a gas utility and to order the appropriate disposition thereof.

The Railroad Commission of Texas, based on the evidence submitted in this proceeding, is of the opinion that the transportation revenues derived from intrastate operations are necessary to maintain the financial integrity of Lo-Vaca Gathering Company, and that to prevent irreparable harm to the public interest it is necessary that the Order of March 7, 1977, in Gas Utilities Docket No. 830 permitting the use of these revenues for the payment of the ordinary and necessary expenditures incurred in the operation of Lo-Vaca Gathering Company be made final.

The Railroad Commission is further of the opinion that the revenues received or to be received by Lo-Vaca Gathering Company from the interstate operations which are the subject of Gas Utilities Docket Nos. 830 and 991, exclusive of the loss of liquids compensation components, the incremental transportation cost of service, and Lo-Vaca's systemwide weighted average cost of gas determined pursuant to the September 27, 1973 Interlocutory Order in Gas Utilities Docket No. 500, represent revenues that were not heretofore anticipated or considered by Lo-Vaca Gathering Company, its existing sales customers, or the Railroad Commission, and should be credited to the cost of gas component of the charge for natural gas made by Lo-Vaca to its existing sales customers.

1. It Is Therefore Ordered By The Railroad Commission Of Texas that the March 7, 1977 Order of this Commission in Gas Utilities Docket No. 830 insofar as it permitted the use of the revenues derived from intrastate transportation operations for the payment of the ordinary and necessary expenditures incurred in the operations of Lo-Vaca Gathering Company is hereby made FINAL.

2. It Is Further Ordered that the revenues derived from the interstate operations which are the subject of Gas

Utilities Docket Nos. 830 and 991, exclusive of the loss of liquids compensation components not to exceed 4.25¢ per Mcf in the transportation contract for Transcontinental Gas Pipeline Corporation, not to exceed .71¢ per Mcf in the transportation contract for Columbia Gas Transmission Company in Gas Utilities Docket No. 830; the loss of liquids compensation component not to exceed 6¢ per Mcf in the sales contract for Transcontinental Gas Pipeline Corporation in Gas Utilities Docket No. 991; the incremental transportation cost of service incurred by Lo-Vaca Gathering Company in performing the services in the above-mentioned contracts, not to exceed 1¢ per Mcf; and Lo-Vaca's systemwide weighted average cost of gas determined pursuant to the September 27, 1973 Interlocutory Order in Gas Utilities Docket No. 500, be credited to the charge for natural gas made by Lo-Vaca to its existing sales customers.

3. It Is Further Ordered that Lo-Vaca credit the charge made for natural gas to its existing sales customers with all revenues received from all interstate operations less those revenues identified in ordering paragraph number 2 in the first billing month next succeeding the date of this Order.

4. It Is Further Ordered that Lo-Vaca credit the charge for natural gas to its existing sales customers from all revenues to be received in the future from interstate operations, exclusive of any loss of liquids compensation components not to exceed the cents per Mcf for each arrangement described in ordering paragraph number 2 above; incremental cost of service components, not to exceed 1¢ per Mcf; and its systemwide weighted average cost of gas to be determined pursuant to the September 27, 1973 Interlocutory Order in Gas Utilities Docket No. 500, over the same period of time such revenues are received.

5. It Is Further Ordered that Lo-Vaca Gathering Company will report all revenues that have been and/or will be received from interstate operations broken down into loss of liquids compensation, incremental transportation cost of service, and the systemwide weighted average cost of gas determined or to be determined pursuant to the September 27, 1973 Interlocutory Order in Gas Utilities Docket No. 500, and the credit to be made to the charge for natural gas to the existing sales customers of Lo-Vaca pursuant to this Order for any one calendar month by filing a statement with the Director of the Gas Utilities Division of the Railroad Commission of Texas no later than forty-five (45) days after the reported month.

Done At Austin, Texas, this the 4th day of April, 1977, pursuant to Tex. Rev. Civ. Stat. Ann. art. 6252-13a, § 15 (Supp. 1976).

Railroad Commission of Texas

Mack Wallace
Chairman

Commissioner

.....
Jon Newton
Commissioner

Attest:

Elizabeth Mauropoulis
Secretary

Supreme Court, U. S.
FILED
JAN 11 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

December Term, 1977

* * *

NO. 77-831

* * *

LO-VACA GATHERING COMPANY,
Petitioner,

V.

THE RAILROAD COMMISSION OF TEXAS,
Respondent

* * *

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE EMERGENCY COURT OF APPEALS OF THE UNITED STATES

* * *

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* * *

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRiT OF CERTIORARI TO THE EMERGENCY COURT OF APPEALS OF THE UNITED STATES

* * *

Respondent, Railroad Commission of Texas respectfully prays that this Petition for Writ of Certiorari be denied. The opinion of the Temporary Emergency Court of Appeals of the United States below, dismissing Petitioner's complaint for want of jurisdiction, correctly resolved the issues raised by Petitioners.

QUESTION PRESENTED

Is the Temporary Emergency Court of Appeals of the United States limited to the review of federal agency orders and actions taken by the administrator of the Emergency Natural Gas Act of 1977?

STATEMENT OF THE CASE

Lo-Vaca sought in the Temporary Emergency Court of Appeals ("TECA") to have certain orders issued by the Railroad Commission of Texas (Commission) set aside on the grounds that they conflicted with orders issued by the Administrator Richard Dunham under the Emergency Natural Gas Act of 1977 ("ENGA"). Lo-Vaca filed its complaint purportedly pursuant to Section 10(b) of ENGA, Respondent contends, which does not contemplate the filing of the instant complaint and does not authorize the exercise of TECA's judicial power to entertain this suit as a trial court on the merits or issue a binding decision thereon.

Lo-Vaca voluntarily negotiated and agreed privately for the arrangement of transportation of natural gas to the Northeastern section of the United States. Approval of such transportation was conducted as an exemption from interstate regulation through congressional action and presidential validation duly carried out by Richard L. Dunham, administrator of ENGA. No complaint was made by Lo-Vaca before Administrator Dunham that the order issued by the Commission conflicted with such orders of the Administrator. The only action taken by Lo-Vaca in a federal forum was an attempt at filing an original complaint for a trial upon the merits before TECA.

The order of the Commission did not regulate the terms and conditions of the contracts for transportation of gas by Lo-Vaca. What the Commission's order did was merely to freeze the expenditures of monies collected. Lo-Vaca was not ordered to charge a different rate for the transactions approved by Administrator Dunham. TECA dismissed Lo-Vaca's appeal from the Commission's action on the basis it did not have jurisdiction. Judge Jamison filed a concurring opinion

indicating that he would dismiss the complaint of Lo-Vaca on the merits in favor of the Commission (TECA opinion at 11).

REASONS FOR DENYING THE WRIT

I.

TECA IS NOT A TRAIL COURT

Section 10(b) of the ENGA does not contemplate the filing of an original complaint nor the exercise of judicial power by TECA to entertain a suit on its merits. Courts of Appeal, the statutory courts created by Congress pursuant to Article III, Section 1 of the United States Constitution, have no jurisdictional power other than those specifically vested by Congress *Cary v. Curtis*, 44 U.S. (3How) 236 (1845). TECA, while established as a court of appeals, was given specialized jurisdiction by Congress under the Economic Stabilization Act of 1970, as amended[1] to enforce economic controls imposed under such Act. Section 10(b) of ENGA provides that TECA "shall have exclusive original jurisdiction to review all civil cases and controversies under the act, including any order issued, or other action taken, under this Act." 15 U.S.C. §717 Note (Supp. I. 1977).

In creating TECA, Congress explicitly stated that except as to the prohibition of the issuance of an interlocutory decree staying or restraining any provision of the Economic Stabilization Act or regulation or order issued thereunder, that TECA shall have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it under Section 211 of the Economic Stabilization Act. TECA has

[1]P.L. 92-210, 85 Stat. 743, §211(b), 12 U.S.C. §1904 note.

subsequently been granted exclusive jurisdiction over all appeals in the district courts in cases arising under the Emergency Petroleum Allocation Act of 1973, as amended.[2] Therefore, since the time of its creation and thereafter, TECA has served as an appellate court to review the record in cases filed before it in accordance with the grant of jurisdictional power contained in the referenced statutes. It is true that TECA was given its grant of jurisdiction under ENGA during a period of crisis stemming from curtailment of natural gas supply in the interstate market, but did not mean the essential function of the court was to be changed when Lo-Vaca asked TECA to convert itself into a trial court to develop facts, hold evidentiary hearings and otherwise consider an original complaint seeking resolution of an alleged conflict between a state regulatory commission and its intra-state regulated utility. Since there was no record to review other than the record made before the Commission, Lo-Vaca attempted to reform TECA's appellate function by obtaining a pre-hearing conference and hearing before the court. See Lo-Vaca's Motion for Pre-hearing Conference and Extension of Time, TECA Docket No. 5-23.

The statutory grant of jurisdiction to TECA under Section 10(b) of the ENGA parallels that given the district court under Section 211 of the Economic Stabilization Act. As the TECA original at 6 points out:

> "Though both courts entertain original complaints, the jurisdiction of TECA under the ENGA is not so broad as that of the district court under the Emergency Stabilization Act."

Section 210(a) of the Economic Stabilization Act, 12 U.S.C. §1904 note (Supp. 1977), created a private cause

[2] 15 U.S.C. §751, *et. seq.*

of action against another private party for any person suffering legal wrong under the statute. *Griffin v. United States*, 537 F.2d at 1130, 1134-36 (TECA 1976). Section 211(a) of the Economic Stabilization Act, 12 U.S.C. §1904 note (Supp. 1977), provided a separate remedy, which is available for a plaintiff subject to price control having a complaint against the enforcing agency or for other plaintiffs who have been aggrieved by former decisions or orders which denied administrative relief for which they believed they were entitled under the act. *Air Products and Chemicals, Inc. v. United Gas Pipeline Co.*, 503 F.2d 1060, 1063, (TECA 1974). As the TECA opinion forcefully points out, ENGA envisioned no such private cause of action as set out in §210 of the Economic Stabilization Act and therefore, is totally distinguishable from the section cited by Lo-Vaca. The illogical parallel that Lo-Vaca draws at page 8 of its Petition seems to be that Congress did not want to burden TECA with criminal prosecutions under the Act but TECA was to take responsibility for all civil matters. This has nothing to do with the private remedies under the Economic Stabilization Act which TECA clearly held were not provided for under the ENGA.

In determining the types of cases that TECA may review, as pointed out in its opinion at 7, "Section 10(b) extends jurisdiction to (1) cases and controversies under this Act, (2) *including* any order issued, or other action taken under this Act." (Emphasis added). While Lo-Vaca argues that the work "including" in Section 10(b) of ENGA is not a word of limitation, Lo-Vaca does not point out why TECA was wrong in its interpretation, nor does it even discuss the word "including" that is used in the Economic Stabilization Act. In *Air Products and Chemicals, Inc. v. United Gas Pipeline Co.*, 503 F 2d at 1063 (TECA 1974), "including" has been interpreted to mean a review of federal

administrative decisions only or action taken under the statute itself. We agree with the TECA that it is reasonable to conclude Congress intended to restrict Section 10(b) of ENGA in the same fashion that it limited jurisdiction under the Economic Stabilization Act. The legislative history of Section 10(b) reinforces this conclusion. As originally introduced in each house of Congress, Section 10(b) gave TECA:

> ". . . exclusive original jurisdiction to review any order issued or other action taken under this Act."

123 Cong. Rec. S. 1540 (daily ed. Jan. 26, 1977) (Remarks of Sen. Stevenson). TECA opinion at 8.

The addition of the phrase "case or controversies arising under the Act" as a simple technical amendment operated only to conform the jurisdictional grant of Section 10(b) to the basic requirements of federal jurisdiction as contained in Article III of the U.S. Constitution. Thus, the amendment was designed to restrict TECA's power to review "any order issued or action taken under the Act".

II.

RAILROAD COMMISSION ORDERS DO NOT CONFLICT WITH ORDERS OF ADMINISTRATOR

Before getting swept up with the Lo-Vaca argument that Sections 6 and 14 of the Act vests in the administrator comprehensive powers to make emergency allocations of natural gas, it is well to remember that Section 6 of TECA primarily empowers the President and his designate, the Administrator, to authorize any interstate pipeline or local distribution company to contract for emergency supplies of natural

gas at prices he deems appropriate. Nothing is mentioned relative to the allocation of revenues arising from the transportation of such supplies. It is equally clear the Commission did not interfere with the allocation, emergency delivery, transportation or purchase of natural gas by establishing a program in any of these areas prohibited by Section 14 of the Act. There is no provision in Section 14 of the Act which would place revenues in the category of "transportation" or "program for delivery". Allocation of transportation costs is not authorized under the Natural Gas Act. Supplemental Emergency Order of the Administrator, Docket No. E77-83, issued June 10, 1977, (Appendix 1). The Administrator authorized Transco to collect, subject to refund, proposed transportation rates for gas transported as agent for its customers and for others. Such action was protested along with the allocation of transportation costs for Transco's interstate transportation of emergency gas purchased under the authority of ENGA. The Administrator held that the allocation of transportation costs was not authorized under ENGA in that the statute does not specifically declare how an interstate pipeline's transportation costs are to be allocated in a rate proceeding under the Natural Gas Act, 15 U.S.C. Section 1717, *et seq.*

> "As administrator, I exercise that authority vested in the President by Section 6 of the Act; however, that authority *does not include the allocation of transportation costs* under the Natural Gas Act. The allocation of transportation costs is a matter to be considered by the FPC (Federal Power Commission), and the pleadings in this proceeding demonstrate that the FPC is considering the allocation of Transco's transportation costs including the question whether any of such costs should be allocated to the Section 6 gas transported by Transco."

> Page 4 of Order, (Appendix 1). (Emphasis added).

If the FPC rather than the Administrator is vested with the jurisdiction to determine the allocation of transportation costs, then the corollary that logically follows is that a pipeline which is not regulated by the FPC but subject to state regulation, (in this instance Lo-Vaca), will have its transportation costs allocated in accordance with normal procedure by the appropriate state regulatory authority. If there had been such interference with Administrator Dunham's order, as Lo-Vaca amazingly asks this Court to assume occurred, then Lo-Vaca should have appeared before Administrator Dunham to complain rather than trying to bring an original proceeding before TECA. It is obvious that Lo-Vaca could not show any such conflict and did not want to risk a contrary finding by appearing before the Administrator, the person who had jurisdiction to hear the original complaint. We believe that the TECA court succinctly concluded the matter correctly when it stated:

> "After studying the legislative history, the language of the act and judicial construction of acts similar to the ENGA, we find that Congress meant for TECA to have no jurisdiction over an original complaint challenging an order of the State Regulatory Commission." Original opinion at 9.

III.

CASE OF FIRST IMPRESSION

Lo-Vaca argues under its Point 2, page 8 of its Petition, that this case is an unusual one. It is submitted the only thing unusual about it is Lo-Vaca's effort to bring an original complaint before TECA. If it can be

fairly said that the litigation presently before the Court is unique, it is equally obvious that the exact facts may not be repeated again, they being peculiar to this case. The Court should avoid cases which present fact situations that are not likely to occur again. While the legal questions presented may be interesting in an academic sense, rules of law announced in an atypical case such as this may cause lower courts to unwittingly make "bad law" in the typical cases.

CONCLUSION

For all of the reasons stated above, Respondents respectfully submit that TECA correctly dismissed Petitioner's complaint, as amended, for lack of jurisdiction and that the Petition for the Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, counsel of record for Respondent, hereby certify that on this the *9th* day of January, 1978, I have served by mail, postage prepaid, copies of the foregoing to counsel for Petitioner.

DAVID HUGHES
Assistant Attorney General

APPENDIX 1

Docket No. E77-83

ADMINISTRATOR
EMERGENCY NATURAL GAS ACT
OF 1977

SUPPLEMENTAL EMERGENCY ORDER
PURSUANT TO SECTION 6
OF PUB. L. 95-2

By order issued April 4, 1977, pursuant to Section 6 of the Emergency Natural Gas Act of 1977 (Act), Pub. L. 95-2 (91 Stat. 4 (1977)), Transcontinental Gas Pipe Line Corporation (Transco) was authorized to collect, subject to refund, proposed transportation rates for the transportation of (i) gas purchased under the Act by Transco as agent for its customers and (ii) gas transported for others. The rates to be charged for such service will be determined in Transco's pending Federal Power Commission (FPC) rate proceedings.

On April 5, 1977, Public Service Company of North Carolina, Inc. (Public Service), Piedmont Natural Gas Company, Inc. (Piedmont), and North Carolina Natural Gas Corporation (NCNGC) [collectively the "North Carolina Companies"] protested the filing. The North Carolina Companies stated that (i) the charges would make most emergency gas unsalable in North Carolina, (ii) the charges are not necessary to recoup any costs associated with this transportation, and (iii) the filing is inconsistent with orders issued in Docket No. E77-58

and other proceedings under the Act.[1] On April 6, 1977, the North Carolina Companies petitioned for rehearing of the April 4 order on the grounds that Section 6(b) (2) (91 Stat. 4, 8) prohibits the FPC from causing Transco to suffer undercollections. Also, on April 11, 1977, United Cities Gas Company (United Cities) protested Transco's filing on the grounds that it results in a price level which is unfair and inequitable and requested that such charges not be permitted to become effective. Transco answered the above filings on May 9, 1977.

By letter order issued April 27, 1977, the FPC rejected Transco's filing in Docket No. RP77-48, which was the basis for Transco's April 1, 1977 filing in this proceeding.[2] On May 23, 1977, the FPC denied Transco's petition for rehearing of the April 27, 1977 order.[3]

On June 1, 1977, Transco proposed new transportation rates, effective April 1, 1977, equivalent to the rates in effect, subject to refund in FPC Docket No. RP77-26. These rates are 28.2 cents, 29.8 cents and 31.5 cents per MMBtu for Rate Zones 1, 2 and 3, respectively.

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[1]The North Carolina Companies amended this filing on April 19, 1977, and attached an order of the North Carolina Utilities Commission which authorized Public Service to price gas purchased under the Act on a rolled-in rather than incremental basis.

[2]The North Carolina Companies and United Cities urged rejection of Transco's filing on the basis of this order in filings submitted May 2 and May 3, 1977, respectively.

[3]On May 24 and May 27, 1977, the North Carolina Companies and United Cities urged rejection of Transco's filing on the basis of this order.

On June 3, 1977, the North Carolina Companies opposed Transco's June 1 request on the grounds that (i) the imposition of transportation charges in addition to the incremental cost of emergency gas results in an unfair burden on the high priority customers of the North Carolina Companies; (ii) the transportation rates would yield revenues greatly in excess of Transco's claimed costs; (iii) Transco is protected from undercollections by Section 6(b) (2); (iv) there is no incremental transportation costs other than fuel; and (v) the North Carolina Companies have submitted expert testimony in FPC Docket No. RP76-136 demonstrating that incrementally priced gas should not be burdened with transportation costs where such costs affect the marketability of such gas.

The April 4 order accepted Transco's original rates "subject to refund pending the resolution of Transco's FPC rate proceedings in Docket Nos. RP76-136, RP77-26, and RP77-48 . . . ." The rejection of Transco's filing in FPC Docket No. RP77-48 automatically rejected Transco's April 1, 1977 filing in this proceeding. Thus, the only pending matter is Transco's June 1, 1977 filing and the North Carolina Companies' June 3 opposition to that filing.

The first, second, fourth and fifth points raised by the North Carolina Companies are matters to be decided in the FPC rate proceedings. The FPC must determine whether emergency gas volumes transported through Transco's system should bear a part of the costs of such pipeline. According to the North Carolina Companies' June 3 opposition, testimony and evidence regarding these matters have been submitted in Transco's FPC rate proceedings in Docket No. RP76-136, *et al.* Therefore, I find no basis for considering such points a second time in this proceeding.

The third point raised by the North Carolina Companies requires an interpretation of Section 6(b)(2) of the Act which reads as follows:

> In exercising its authority under the Natural Gas Act, the Federal Power Commission shall not disallow, in whole or in part, recovery by any interstate pipeline, through the rates and charges made, demanded, or received by such pipeline, the amounts actually paid by it for natural gas purchased, transported, or other costs incurred pursuant to subsection (a).

The North Carolina Companies assert that this section protects Transco from undercollections if the FPC allocates costs to the transportation of emergency gas. The North Carolina Companies' interpretation is erroneous.

Section 6(b) (2) applies to amounts incurred pursuant to Section 6(a). Section 6(a) relates to the purchase, not the transportation, of emergency supplies of natural gas. Matters relating to the transportation of emergency gas supplies are covered by Section 6(c) (1). The Act does not state how an interstate pipeline's own transportation costs are to be allocated in a rate proceeding under the Natural Gas Act (15 U.S.C. § 717, *et seq.*). As administrator, I exercise that authority vested in the President by Section 6 of the Act; however, that authority does not include the allocation of transportation costs under the Natural Gas Act. The allocation of transportation costs is a matter to be considered by FPC, and the pleadings in this proceeding demonstrates that the FPC is considering the allocation of Transco's transportation costs including the question whether any of such costs should be allocated to the Section 6 gas transported by Transco.

Pursuant to § 6(c) (1) of the Act (91 Stat. 4, 8), I authorize Transco to collect the transportation rates proposed in its June 1, 1977 filing for all volumes purchased for others pursuant to § 6(a) of the Act (91 Stat. at 7-8) and transported by Transco. Such rates shall be collected subject to refund pending the resolution of Transco's FPC rate proceedings in Docket Nos. RP76-136 and RP77-26 and any other FPC rate proceeding applicable to the period during which these transportation services are rendered.

This order is issued pursuant to the authority delegated to me by the President in Executive Order No. 11969 (February 2, 1977), and shall be served upon all parties in Docket No.s E77-14, E77-18, E77-20, E77-34, E77-40, E77-41, E77-42, E77-58, E77-63 and E77-72. This order shall also be published in the *Federal Register.*

This order and authorization granted herein are subject to the continuing authority of the administrator under P.L. 95-2 and the rules and regulations which may be issued thereunder.

S/S

Richard L. Dunham
Administrator

June 10, 1977